

// 1 //

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT

IN

S.B. Civil Second Appeal No.179/1987

Bhanwara S/o Ramu & Others

...defendant-appellants

Versus

Shri Chand S/o Bhondu

...plaintiff-respondent

Date of Judgment ::: 17th October, 2006

PRESENT

Hon'ble Mr. Justice Narendra Kumar Jain

Dr. P.C. Jain, Advocate, with
Shri Rajesh Chaturvedi, Counsel for defendant-
appellants.

Ms. Anita Aggarwal, Advocate, for
Shri G.K. Garg, Counsel for plaintiff-respondent

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//REPORTABLE//

By the Court:-

This second appeal under Section 100 of the Code of Civil Procedure has been filed by the defendant-appellants against the judgment and decree dated 21.11.1987 passed by the District Judge, Bharatpur, in Civil Appeal No.27/1983, whereby the appeal of the plaintiff was allowed and the judgment and decree dated 1.3.1983 of the Additional Munsif & Judicial Magistrate No.1, Bharatpur, in Civil Suit No.87/1977, was set aside, whereby the trial court

dismissed the suit of the plaintiff.

The first appellate court decreed the suit of the plaintiff-respondent for possession in respect of two biswas land of khasra no.333.

While admitting the second appeal on 24.7.1989, this court formulated following substantial questions of law:-

“(1) Whether on the basis of the evidence adduced in the case, the plaintiff respondent has at all been able to establish that the defendant had on June 12, 1973 trespassed over land measuring 2 biswa out of land measuring 6 biswas of khasra no.1300/1 (300) as detailed and described in Para 1 of the plaint?

(2) Whether the suit was exclusively triable by Revenue Court and the Civil Court had no jurisdiction to try it?”

I have heard learned counsel for both the parties at length and minutely scanned the impugned judgments as well as the record of both the courts below.

Learned counsel for the defendant-appellants contended that the disputed 2 biswas land is not a part of khasra no.333 belonging to plaintiff-respondent, and the same is part and partial of khasra

no.334 belonging to defendant-appellants. He contended that there are other 'khatedars' of land bearing khasra no.333 and it is quite possible that other persons would have trespassed over the land belonging to the plaintiff. He, therefore, contended that the finding of the learned first appellate court is liable to be set aside.

The learned counsel for the defendant-appellants further contended that the nature of the land in dispute is agriculture land, therefore, the civil court had no jurisdiction to entertain, try and decide the present suit for possession in respect of agriculture land, therefore, the judgment passed by the learned first appellate court is without jurisdiction and the same is liable to be set aside.

Per contra, learned counsel for the plaintiff-respondent contended that the question no.1 formulated by this court in the present case, as mentioned above, relates to question of fact. The learned first appellate court has recorded a specific finding that the disputed piece of land measuring 2 biswas, out of khasra no.333, has been trespassed by the defendants and this being a question of fact, is not open to be challenged in second appeal. The entire argument of the learned counsel for the defendant-appellants is

based on appreciation of evidence, which is not permissible in second appeal under Section 100 of the Civil Procedure Code.

Learned counsel for the plaintiff-respondent further contended that the disputed piece of land is situated in populated area and as per the finding of the learned first appellate court it is a 'abadi' land, therefore, the civil court had jurisdiction to entertain, try and decide the present suit. It has further been contended that the said point relating to jurisdiction of civil court was not challenged by the defendants before the first appellate court, which is clear from the judgment of the first appellate court itself and, in these circumstances, the said question was given-up by the defendants and, thus, the defendants cannot be allowed to argue the said question before this court. In support of the contention, the learned counsel for the plaintiff-respondent relied upon the decision of the Hon'ble Supreme Court in the case of Madan Mohan Kotal Vs. Gobinda Kotal & Another - (2002)9 SCC 457, and Gopal Vs. Durga Prasad & Others - 1973 WLN 967.

I have considered the submissions of learned counsel for both the parties and minutely scanned the finding of first appellate court as well as case law

referred during the course of arguments.

In Madan Mohan Kotal's case (supra), the Hon'ble Supreme Court held that the High Court was in error in allowing the ground, which had been given-up before the courts below, to be raised for the first time in revision before the High Court.

In Gopal's case (supra) this Court, after considering the definition of 'abadi land', as defined under the provisions of the Rajasthan Land Revenue Act, 1956, held that the land appertain to a temple, which is used for cultivation, does not become agricultural land. The temple and the land appertain thereto which includes the land in dispute, is in the populated area of the Town of Khetri and must be deemed to be a part of the populated area. Merely because a portion of the land in the compound of the temple is being used as a garden or for the matter of that for cultivation, would not change the character of the land being 'abadi land'. This court further held that the land in question is 'abadi' land and does not fall within the definition of 'land' as contained in Section 5 (24) of the Rajasthan Tenancy Act.

The learned first appellate court, after appreciating the evidence, recorded a finding that the

disputed 2 biswas land is a part of land bearing khasra no.333 belonging to the plaintiff-respondent and the same had been trespassed by the defendant-appellants on 12th of June, 1973. The learned first appellate court has observed that earlier to the present suit for possession, a suit for permanent injunction was also filed by the plaintiff to restrain the defendants and in the said suit, the defendants filed their written statement stating that they did not give any threatening to the plaintiff to trespass over the land of the plaintiff. The learned first appellate court came to a conclusion that there was an admission on behalf of the defendants to the effect that the land belongs to the plaintiff. The learned first appellate court has recorded a specific finding that the disputed piece of land is a part of land bearing khasra no.333 and the same has been trespassed by the defendants. This being a question of fact by the first appellate court, cannot be allowed to be raised in the second appeal under Section 100 of the C.P.C.

So far as another question, relating to jurisdiction of the civil court, is concerned, it is sufficient to mention that the said point was given-up by the defendants before the first appellate court,

which is clear from Para 29 of the judgment dated 21.11.1987 passed by the first appellate court, therefore, the said point cannot be allowed to be challenged in this second appeal.

Apart from above, it is also relevant to mention that the learned first appellate court, after considering the nature of the land and the place as well as the area where it is situated, has recorded a finding that the disputed piece of land is a 'abadi' land and the civil court had jurisdiction to entertain, try and decide the suit.

Consequently, the question no.1 is decided by holding that there was sufficient evidence in the case to establish that the defendants had trespassed over the land in dispute measuring 2 biswas, on 12th of June, 1973 and the learned first appellate court was right in decreeing the suit of the plaintiff for possession; and, the question no.2 is decided in the manner that the said point was given-up by the defendants before the first appellate court, therefore, they cannot be allowed to challenge the same before this court under Section 100 of the CPC and further that as per the finding of the first appellate court the land in dispute was a 'abadi' land, the civil court had jurisdiction to entertain,

// 8 //

try and decide the suit.

In the result, I do not find any merit in the second appeal and the same is accordingly dismissed with no order as to costs.

(Narendra Kumar Jain) J.

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